SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 899

JOHN L. KINNISON,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR WRIT OF CERTIORARI

John L. Kinnison, petitioner, prays that a writ of certiorari be issued to review the judgment entered November 18, 1946, in the United States Court of Appeals for the District of Columbia (R. 14).

JUDGMENT BELOW

Appeal from judgment of United States District Court for the District of Columbia (R. 14).

This cause came on to be heard from the United States District Court for the District of Columbia, and was submitted by counsel (R. 8).

On consideration whereof, it is now ordered that the judgment of said District Court be and is hereby affirmed.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939, as amended. The opinion of the United States Court of Appeals for the District of Columbia was filed November 18, 1945 (R. 12) An order extending time within which to file petition for certiorari to and including January 17, 1947, was signed by the Chief Justice of the United States on December 18, 1946. The opinion of the United States Court of Appeals for the District of Columbia is included in attached record.

STATEMENT OF CASE

The United States Court of Appeals for the District of Columbia affirmed the judgment of the United States District Court for the District of Columbia (R. 14), which Court sentenced the petitioner to imprisonment for a term of from one to three years on each of four counts of an indictment, the sentences to run concurrently. Petitioner was convicted and sentenced for alleged violations of the

Marihuana Act. (50 Stat. 551 (1937), 26 U.S.C. 2590(a) et seq. (1940).

The questions now before this Court are whether the indictment is sufficient in regard to counts one and three. The appellate court did not pass on the objections to counts two and four. However counts two and four of the indictment are fatally defective for additional reasons than those urged and argued in the district and appellate courts.

Counts one and three of the indictment are the same save for the dates of the alleged transfers of marihuana and the quantities allegedly transferred by the petitioner. These counts will therefore be discussed as one and are referred to hereinafter as the indictment.

Before discussing the questions presented, present counsel wish to point out that their services were retained after the Court of Appeals affirmed the conviction hithertofore had. They are therefore generally bound by the record previously established subject to the provisions of Rule 27(6) of this Court.

The pertinent statute involved is the Marihuana Tax Act of 1937 (Aug. 2, 1937, ch. 553, 50 stat. 551) (Sections 2591 (a) and 2600 of the Internal Revenue Code.

QUESTIONS PRESENTED

Whether the indictment is fatally defective in that:

I. It fails to charge any offense under Section 2591(a) of Title 26 of the Internal Revenue Code or any other section of the United States Code.

II. It fails to fulfill the elementary requirements of a legally sufficient criminal pleading.

III. The misrecital of the statute involved in the indictment and the insufficiency of the indictment are fatal de-

fects as they misled and substantially prejudiced the petitioner in the preparation of his defense and thereby precluded him from presenting a full and complete defense at the time of trial.

Before presenting the three questions raised counsel for the petitioner wishes to advise the Court that they are familiar with the various federal decisions covering judicial notice of federal departmental orders and regulations and the general rule as to incorrect references to a statute in an indictment. It is submitted that the decisions in those cases are not governing nor applicable.

QUESTION I

The indictment fails to charge any offense under Section 2591(a) of Title 26 of the Internal Revenue Code or any other section of the United States Code.

Section 2591(a) of Title 26 provides:

> "It shall be unlawful for any person, . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, *on a form to be issued in blank by the Secretary* (of the Treasury)."

The indictment charges the petitioner did:

> " . . . transfer . . . marihuana, . . , which said transfer was not made in pursuance of a written order of the . . . (transferee), *on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Section 2591(a) of of the Internal Revenue Code; . . .*"

Section 2591(a) does not require the use of any form "issued by the Commissioner of Internal Revenue" for the

transfer of marihuana by any person. It requires only the use of a form issued by the Secretary of the Treasury. The statute involved is penal in nature and must be strictly construed against the government, the alleged offenses are merely malum prohibitum.

The government elected to prosecute the petitioner under the provisions of Section 2591(a), not under any alleged departmental order transferring the rights and duties imposed on the Secretary of the Treasury by that section. It was therefore incumbent on the prosecution to not only set forth all the facts and circumstances essential to constitute the alleged offense but also to pursue the precise technical language of the statute. *U. S. v. Gooding,* 12 Wheat. 460; *U. S. v. Staats,* 8 How. 41, 44; *U. S. v. Cruikshank,* 92 U. S. 542, 557, 562; *U. S. v. Mann,* 95 U.S. 580, 583, 585; *U. S. v. Simmons,* 96 U.S. 360; *U. S. v. Hess,* 124 U.S. 483; *Blitz v. U. S.,* 153 U.S. 308, 315; *Ackley v. U. S.,* 200 Fed. 217; *U. S. v. Eisenminger,* 16 F 2d 816, 818. An omission in the indictment or failure to follow the language of the statute cannot be supplied by intendment or implication (*U. S. v. Hess,* supra) nor can it be supplemented or pieced out by extrinsic papers (*People v. Grogan,* 260 N.Y. 138, 183 N.E. 273) and there is no reason why the Court should help any such defective allegations (*U. S. v. Gooding,* supra). The prosecution had made its election of prosecution and is bound by it. Precision is of the last importance in an indictment for it is that *which marks the limit of the accusation and fixes the proof of it. Bishop's New Criminal Procedure,* Vol. 2, 2d edition, p. 426.

The petitioner was charged with a violation of section 2591(a) but he was not charged in the words of the statute nor was he charged with any offense provided for by or cognizable under that statute or any other United States statute. The indictment against him is fatally defective in

this respect. The indictment must of itself be sufficient without intendment or implication, without reference to extrinsic papers or orders and without reference to other statutes on like matter. *U. S. v. Carll,* 105 U.S. 611, 612. The charge in the indictment must bring the case within the terms of the statute. *U. S. v. Staats,* supra.

QUESTION II

The indictment fails to fulfill the elementary requirements of a legally sufficient criminal pleading.

In charging a statutory offense the indictment must apprize the accused of the precise nature of the charge against him. *Blitz v. U. S.,* 153 U.S. 308, 315. In the present case there is grave doubt, in view of the reference to Section 2591(a) and the Commissioner of Internal Revenue, whether the accused is alleged to have failed to obtain an order issued by the Secretary or one issued by the Commissioner or both. An adequate indictment must be full and distinct and so plain as to preclude the necessity of guessing its meaning. *Bishop's New Criminal Procedure,* supra, p. 426. The indictment in this case entirely ignores the requirements and standards set up by a long line of well-established and approved authorities.

Every indicted person is innocent in the eyes of the law until convicted. The protection of the innocent is the highest duty of a government. An innocent man can know nothing of what is to be brought against him, beyond that set out in the indictment. The indictment must be complete in itself. All that is to be proved must be alleged because the indictment marks the limit of the accusation and fixes the proof of it. *Bishop,* supra.

Statutory offenses, with rare exceptions, consist of more than one ingredient, and the rule is universal that every ingredient comprising the offense must be accurately and clearly expressed in the indictment because ingredients or elements not set forth cannot be incorporated into the charge after the defendant is served with process. *U. S. v. Mann*, 95 U.S. 580, 583, 585. If the offense cannot be sufficiently described without expanding the allegations beyond the mere words of the statute then the allegations of the accusation must be expanded to the extent necessary. *U. S. v. Staats, U. S. v. Cruikshank, U. S. v. Simmons, U. S. v. Hess*, all supra; *U. S. v. Huckabee*, 16 Wal 414; *U. S. v. Britton*, 107 U.S. 655; *Pettibone v. U. S.*, 148 U.S. 197; *Ledbetter v. U. S.*, 170 U.S. 606; *Bartell v. U. S.*, 227 U.S. 427; *U. S. v. Stafoff*, 260 U.S. 477. Otherwise the indictment is insufficient. Nothing can be left to intendment or implication. *U. S. v. Staats, U. S. v. Hess*, both supra.

If we assume for the sake of argument that the Secretary of Treasury had issued forms under Section 2591(a) and then substitute the word Secretary for Commissioner of Internal Revenue in the indictment it would appear that the indictment might follow the words of the statute. However, that is not the case here.

We must therefore asume that the Secretary did not issue any forms under Section 2591(a) and that under Section 2600 the Secretary delegated this power to the Commissioner of Internal Revenue.

It is submitted that under the circumstances of this case the indictment should be required to contain:

1 The requirements regarding forms contained in Section 2591(a).

2. The authorization for delegation of power by the Secretary in Section 2600.

3. The delegation of such power to the Commissioner of Internal Revenue by the Secretary.

4. The promulgation of the forms by the Commissioner.

5. The act or acts by the petitioner that allegedly violated the statute.

These elementary rules of proper criminal pleading should have been followed for the protection of the petitioner as he could not know what was to be brought against him beyond what was set forth in the indictment. *Bishop*, supra. Certainly, as the Court said in *U. S. v. Simmons*, 96 U.S. 360, 362:

> "It was neither impracticable nor unreasonably difficult to have done so."

It is noted that proper pleadings, along the lines suggested, were used in the oleomargarine cases. See *U. S. v. Eaton*, 144 U.S. 677 and *In Re Kollock*, 165 U.S. 526. In these cases the indictments set out the statute involved, the authority given the Commissioner of Internal Revenue in regards to branding regulations, the promulgation of certain regulations by the Commissioner and the violation thereof by the defendants.

The petitioner in the present case was entitled to the information suggested. The attempted expediencies and short cuts in this case only violate the constitutional rights of the petitioner.

Before the petitioner could be guilty of any offense under Section 2591(a) for failure to obtain a form issued by the Commissioner of Internal Revenue it was mandatory that: first, the Secretary of the Treasury delegate his power to issue forms under Section 2591(a) to the Commissioner by virtue of the statutory authorization in Section 2600, prior to such delegation the Commissioner had no power of any kind to issue any form under Section 2591(a); and second; the Commissioner must have actually issued an official form in blank for use in the transfer of marihuana, prior to the issuance of such a form there could be no transfer in violation of Section 2591(a). The petitioner should have been apprised of these things as any alleged act by him could only be an offense under and after the circumstances cited. If an offense becomes a crime only under particular circumstances the indictment must charge both the circumstances and the doing. *Bishop*, supra. It must descend to particulars. *U. S. v. Cruikshank*, supra. Any alleged delegation by the Secretary to the Commissioner under Section 2600 and any alleged form promulgated by the Commissioner thereafter were prerequisites of an offense, they became integral and essential elements of the offense and should have been pleaded. The petitioner had a constitutional right to be advised of all the ingredients comprising the alleged offense charged. *U. S. v. Cruikshank, U. S. v. Mann, U. S. v. Eisenminger*, all supra.

In addition to the petitioner being entitled to be advised in the indictment of any action of delegation by the Secretary under Section 2600 or of promulgation thereafter by the Commissioner under 2591(a), as prerequisites and integral elements of the alleged offenses, it would appear that any action taken by the Secretary or Commissioner would be in the nature of a paper writing. Such paper writings, being prerequisites to and essential elements of the offenses

charged, should have been either set out verbatim or at least sufficiently described to make known their contents or substance. *Bartell v. U. S.*, 427, 431; *U. S. v. Watson*, 17 Fed. 145, 150. It is iterated that as a matter of law the petitioner was entitled to be advised of these things. It was neither impracticable nor unreasonably difficult for the government to have done so. *U. S. v. Simmons*, supra. The charge should have been stated with as much certainty as the circumstances would permit. 27 Am. Jur., 624.

It is further pointed out that nowhere in the indictment is there a direct, unequivocal averment that any form for the transfer of marihuana was ever issued at any time by the Commissioner of Internal Revenue or any other person. At best the possibility of any form having been issued by the Commissioner prior to the date of the alleged offenses by the petitioner is left to intendment and implication. The indictment fails to state that a form was issued prior to the date of the alleged offenses (April 1945) or issued between that time and the presentation of the cases to the Grand Jury (January Term, 1946). The issuance of a form was a prerequisite to any violation of Section 2591(a), such issuance should be affirmatively and unequivocably alleged. It should not be left to intendment and implication. *U. S. v. Staats, U. S. v. Hess, Blitz v. U. S.*, all supra. The ommission of an essential element makes the indictment insufficient. *U. S. v. Mann, U. S. v. Hess,* both supra. When there is such an omission there is no reason why the Court should help such defective allegations. *U. S. v. Gooding,* supra.

QUESTION III

The misrecital of the statute involved in the indictment and the insufficiency of the indictment are fatal defects as they misled and substantially prejudiced the petitioner in the preparation of his defense and thereby precluded him from presenting a legally full and complete defense.

On consideration of the position taken by former counsel in the district and appellate courts it appears clear that the petitioner relied on the insufficiency of the indictment in this case at the time of trial. This reliance was reasonable and proper under the circumstances in view of the misrecital of the statute involved and the insufficiency of the indictment, and its failure to conform to elementary requirements of criminal pleading.

The government filed its pleading (the indictment) in this cause and was bound thereby, the petitioner had a right to take advantage of and rely upon the fatal defects therein.

However, by his reliance as stated, the petitioner was misled and substantially prejudiced in the preparation of his defense. A full and complete defense was therefore not presented at the time of trial. This defense was illegal delegation of authority.

Under Section 2591(a) the power to issue forms for the transfer of marihuana was vested in the Secretary of the Treasury by Congress. Section 2600 authorized the Secretary to

> " . . . confer or impose any of the . . . powers conferred . . . upon such officers or employees of the Treasury Department as he shall designate or appoint."

There was no provision for the delegation of these powers by anyone other than the Secretary of the Treasury nor was there any provision for the redelegation of any of the powers by any officer or employee after the delegation thereof by the Secretary.

The appellate court mentions in its opinion (R. p 12) that the

> " . . . power to prescribe the order form had been delegated pursuant to authority . . ."

but fails to state by whom it had been delegated when in fact the said delegation was unlawful.

The attempted delegation of the power to prescribe the order form from the Secretary to the Commissioner of Internal Revenue was not made by the Secretary of the Treasury but by one Stephen B. Gibbons, an Assistant Secretary of the Treasury, who signed the illegal delegation dated September 1, 1937, effective October 1, 1937, as "acting Secretary of the Treasury."

The defense that would have been interposed by the petitioner at the trial, except for his reasonable reliance as stated, to his substantial prejudice, was this attempted illegal delegation of power. The power to prescribe the order form was not delegated as authorized by Congress. The defense is twofold. First, that Stephen B. Gibbons was not in fact the Acting Secretary of the Treasury when he signed the order dated September 1, 1937 attempting to delegate the power to prescribe the order form to the Commissioner of Internal Revenue; and second, that the said Stephen B. Gibbons had already been delegated the authority by the Secretary under Section 2600 as a matter of administrative procedure, and he had no authority to redelegate the same. Because of the substantial prejudice

to the rights of the petitioner, and because of his reasonable reliance aforesaid it is submitted that he is entitled to have an opportunity to present the defenses hereinbefore set out.

REASONS FOR GRANTING THE PETITION

By its opinion the United States Court of Appeals for the District of Columbia is in conflict with the decision of this Court in *Fleisher v. U. S.*, 302 U.S. 218. That court has not given proper effect to applicable decisions of this court as heretofore stated in the discussions of the questions presented and the *Fleisher* case, supra. The opinion of the United States Court of Appeals for the District of Columbia is in derogation of the constitutional rights of the petitioner. In addition it appears that the appellate court has decided an important question of federal criminal pleading in a manner that is a departure from the accepted and usual rulings governing such pleadings, and the same should be ruled upon by this court.

Counsel have noticed with some trepidation the increasing tendency of the courts to overrule objections made in criminal cases on the grounds there was no "substantial prejudice to the rights of the defendant." Admittedly the rules of criminal practice and procedure are changing, so that the minute and detailed pleadings of old are no longer required. However there has been no change in the guarantees of the VI Amendment that gives an accused the constitutional right "to be informed of the nature and cause of the accusation." The changes in criminal practice and procedure that have come about have come through new interpretations of the law, but even these have not altered the requirement that a criminal indictment is held to the highest precision of certainty of all branches of the law.

CONCLUSION

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all the proceedings in the case of United States of America v. John L. Kinnison and that the said judgment of the United States Court of Appeals for the District of Columbia be reversed, and for such other and further relief as to the Court may seem meet and proper.

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Petitioner

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CITATIONS

732815—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 899

JOHN L. KINNISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 8–10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered November 18, 1946 (R. 11). On December 18, 1946, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including January 17, 1947 (R. 12), and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether counts 1 and 3 of the indictment fail to state offenses under Section 2591 (a) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 551, as reenacted in the Internal Revenue Code, 53 Stat. 279 *ff*, 26 U. S. C. 2590 *ff*, provides in pertinent part as follows:

> SEC. 2591. (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary [of the Treasury].
>
> * * * * *
>
> (c) The Secretary shall cause suitable forms to be prepared for the purposes before mentioned and shall cause them to be distributed to collectors for sale. The price at which such forms shall be sold by said collectors shall be fixed by the Secretary, but shall not exceed 2 cents each. Whenever any collector shall sell any of such forms he shall cause the date of sale, the name and address of the proposed vendor,

the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

SEC. 2596. Any person who is convicted of a violation of any provision of this subchapter or part VI of subchapter A of chapter 27 shall be fined not more than $2,000 or imprisoned not more than five years, or both, in the discretion of the court.

SEC. 2600. The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties conferred or imposed upon him by this subchapter or part VI of subchapter A of chapter 27 upon such officers or employees of the Treasury Department as he shall designate or appoint.

The pertinent provisions of the regulations of the Treasury Department relating to the enforcement of the Marihuana Tax Act, issued by Stephen B. Gibbons, Acting Secretary of the Treasury, on September 1, 1937 (T. D. 2[illegible], 2 F. R. 1808–1809), are as follows:

> In pursuance of the authority thus conferred upon the Secretary of the Treasury [i. e., by Section 2600, *supra*], it is hereby ordered:
>
> I. RIGHTS, PRIVILEGES, POWERS AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF NARCOTICS.
>
> 1. There are hereby conferred and imposed upon the Commissioner of Narcotics,

subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers and duties conferred or imposed upon said Secretary by the Marihuana Tax Act of 1937, so far as such rights, privileges, powers and duties relate to—

* * * * *

(b) Prescribing the form of written order required by Section 6 (a) of the Act [section 2591 (a), *supra*], said form to be prepared and issued in blank by the Commissioner of Internal Revenue as hereinafter provided.

* * * * *

II. RIGHTS, PRIVILEGES, POWERS AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF INTERNAL REVENUE

1. There are hereby conferred and imposed upon the Commissioner of Internal Revenue, subject to the general supervision and direction of the Secretary of the Treasury, the rights, privileges, powers and duties conferred or imposed upon said Secretary by the Marihuana Tax Act of 1937, not otherwise assigned herein, so far as such rights, privileges, powers and duties relate to—

(a) Preparation and issuance in blank to Collectors of Internal Revenue of the written orders, in the form prescribed by the Commissioner of Narcotics, required by Section 6 (a) of the Act. * * *.

* * * * *

STATEMENT

After a jury trial, petitioner was convicted in the District Court for the District of Columbia on the first four counts of a six-count indictment charging violations of the Marihuana Tax Act. Counts 1 and 3, respectively, charged that he transferred specified quantities of marihuana in violation of Section 2591 (a) of the Internal Revenue Code (*supra*), in that the "transfer was not made in pursuance of a written order of the [transferee], on a form issued in blank for that purpose by the Commissioner of Internal Revenue"; counts 2 and 4 charged him with acquiring marihuana without having paid the required tax, in violation of Section 2593 (a) of the Internal Revenue Code, 26 U. S. C. 2593 (a). (R. 1–3, 4.) Petitioner was sentenced to imprisonment for a term of one to three years on each count, the sentences to run concurrently (R. 5).[1] On appeal to the United States Court of Appeals for the District of Columbia, the judgment of conviction was affirmed (R. 8–11).[2]

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[1] Section 24–203 of the District of Columbia Code (1940) provides that on conviction of a felony, the defendant shall be sentenced for "a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed."

[2] The record does not contain the evidence adduced at the trial.

ARGUMENT

Petitioner contends that counts 1 and 3 of the indictment are insufficient to support his conviction, because Section 2591 (a) of the Internal Revenue Code, upon which the counts are based, provides that a transfer of marihuana is illegal if not made in pursuance of a written order of the transferee on a form issued in blank for that purpose "by the Secretary [of the Treasury]" (*supra,* p. 2), whereas the counts allege that the transfers were not made pursuant to orders on forms issued "by the Commissioner of Internal Revenue" (*supra,* p. 5).[3]

[3] Petitioner asserts, without supporting argument (Pet. 3), that counts 2 and 4 are also defective. These counts charge unlawful acquisition of marihuana in violation of Section 2593 (a) of the Internal Revenue Code. In his brief in the court below, petitioner attacked his conviction on these counts on the ground that the prosecution had failed to prove the venue of the offenses alleged. Since the court held that the convictions on counts 1 and 3 are valid, it did not pass on this contention, "because of the rule that in a case where separate sentences are imposed to run concurrently, and one count will support the sentence, the judgment will not be set aside although error may have been committed under one or more of the remaining counts" (R. 10). See *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

Since the record does not contain the evidence adduced at the trial, it must be presumed that venue was sufficiently established. Counts 2 and 4, which charged the offenses in the language of the statute, are plainly sufficient. Accordingly, even if there were any merit in petitioner's contention in respect of counts 1 and 3, it would not avail him, since the sentence imposed would be supported by the convictions on counts 2 and 4.

This contention is clearly without merit in view of the express delegation of authority, permitted by the statute, whereby the Secretary empowered the Commissioner of Internal Revenue to issue the required order forms. In rejecting the contentions, the court below relied on its earlier decision in *Cromer* v. *United States,* 142 F. 2d 697, 698, certiorari denied, 322 U. S. 760. In that case the court upheld an indictment charging the sale of a drug in violation of the Harrison Narcotic Act (26 U. S. C. 2553, 2554), which alleged that the sale was not in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, as against the contention that authority to issue such forms had actually been vested in the Commissioner of Narcotics. The court in that case held that "while it appears that the power to prescribe order forms has been delegated to the Commissioner of Narcotics, we are satisfied that the power to issue such forms is vested in the Commissioner of Internal Revenue" (142 F. 2d at 698).[4] While the *Cromer* case is in point in the sense that, as here, the indictment referred to the officer to whom the actual authority to issue

[4] In its opinion in the present case, in describing the situation involved in the *Cromer* case, the court below apparently confused the authority to prescribe the form of written orders, which was delegated by the Secretary to the Commissioner of Narcotics, with the authority to prepare and issue such forms in blank, delegated to the Commissioner of Internal Revenue (R. 9).

the order forms had been delegated, it is evident that the precise contention made in the present case was not involved. However, the same contention was made in *Nailling* v. *United States*, 142 F. 2d 551 (C. C. A. 6), certiorari denied, 316 U. S. 675, which the court below also cited (R. 10). That case, like the *Cromer* case, involved an indictment under Section 2554 (a) of the Internal Revenue Code, which alleged a sale not made in pursuance of a written order on a form issued in blank by the Commissioner of Internal Revenue, whereas the statute, like Section 2591 (a) which is involved here, specified the Secretary of the Treasury as the issuing authority. However, by appropriate delegations authorized by statute, the Secretary had empowered the Commissioner of Internal Revenue to issue such forms, and the court held the indictment good.[5]

[5] *Fleisher* v. *United States*, 302 U. S. 218, upon which petitioner relies (Pet. 13), is clearly distinguishable. In that case, the first count of the indictment charged a conspiracy to possess stills without having them registered with the Collector of Internal Revenue. The Government conceded that "under the applicable law the charge should have been that there was failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue." This Court held that the first count failed to state an offense. As pointed out by the court below in referring to the *Fleisher* case, R. S. § 3258, upon which the count was founded, originally required registration with the Collector of Internal Revenue, but "subsequent reorganization statutes, executive orders and regulations required that stills be registered with the Dis-

Petitioner also contends (Pet. 6–12) that counts 1 and 3 should have alleged the steps by which the authority to issue order forms was delegated by the Secretary of the Treasury to the Commissioner of Internal Revenue, so as to give him sufficient information of the delegation to permit him to challenge it, if he saw fit. This contention is without merit. The statute itself specifically advised petitioner that the Secretary of the Treasury was given the power to delegate any of his duties to subordinate officials (*supra,* p. 3); the indictment advised him that the Government was charging that he made transfers of marihuana not pursuant to written orders on forms issued by the Commissioner of Internal Revenue (*supra,* p. 5); and the regulations embodying the delegation of authority to that official were published in the Federal Register (*supra,* pp. 3–4).[6]

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trict Supervisor of the Alcohol Tax Unit. The indictment there endeavored to charge a present offense in the language of a superseded statute. That is not this case" (R. 9–10). See *Benton* v. *United States*, 80 F. 2d 162 (C. C. A. 4), certiorari denied, 297 U. S. 705, for the history of the statutes involved in the *Fleisher* case.

[6] The claim (Pet. 12) that the delegation of authority to the Commissioner of Internal Revenue was invalid because made by an Acting Secretary of the Treasury (see *supra*, p. 3) is manifestly without force. In the absence of a showing to the contrary, it will be presumed that the Acting Secretary of the Treasury is empowered to exercise the duties of the Secretary. *Perry* v. *Page*, 67 F. 2d 635, 637–638 (C. C. A. 1); see also, *Anderson* v. *P. W. Madsen Inv. Co.*, 72 F. 2d 768, 771 (C. C. A. 10). There is no showing here that the Acting Secretary was not lawfully authorized to issue the regulations in question.

CONCLUSION

The case was correctly decided below. There is no conflict of decisions or question of importance involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
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FEBRUARY 1947.

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